MEWAH OILS & FATS PTE LTD

v.

YEE LEE EDIBLE OILS SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[ORIGINATING SUMMONS NOS: R1-24-76-2000 & R2-24-55-2000]
6 NOVEMBER 2003

ARBITRATION: *Award - Enforcement of - Application for award to be stated as case stated to High Court - Whether unjustified - Alleged questions of law - Whether actually questions of fact - Whether award perfectly valid - Whether to be enforced - Arbitration Act 1952 ss. 22(1)(b), 27*

By a contract of sale dated 7 January 1999, Mewah Oils and Fats Pte Ltd ('Mewah') agreed to sell a quantity of RBD Palm Olein to Yee Lee Edible Oils Sdn Bhd ('Yee Lee'). Under the agreement Yee Lee *inter alia* undertook to nominate and present performing vessel for shipment within the respective contracting months. Yee Lee failed to nominate the vessel in question forcing Mewah to sell off the Palm Olein. Thereupon, Mewah initiated claims against Yee Lee by way of arbitration under the auspices of the Palm Oil Refiners Association of Malaysia ('PORAM'). The arbitrators found that Yee Lee had failed to nominate the vessel for shipment and in the circumstances awarded Mewah damages of USD 152,500 together with interest thereon. Yee Lee appealed to the PORAM Board but the appeal was dismissed. Yee Lee then applied to compel the arbitrators to state its award in the form of a special case stated regarding certain questions of law ('questions (a) to (g) herein') to the High Court under s. 22(1)(b) of the Arbitration Act 1952 ('the Act'). Mewah retorted by seeking to enforce the award pursuant to s. 27 of the Act.

Held (allowing enforcement of award):

[1] The test in deciding whether a matter should be referred to the High Court is as stated in *Halfdan Grieg & Co v. Sterling Coal & Navigation Corp*, the principle which has been accepted by our courts in *Yee Hoong Loong Corp Sdn Bhd v. Kwong Fook Seng Co; Sheacourt Sdn Bhd v. Arab Malaysian Toda Construction Sdn Bhd & Anor*; and *The Government of Malaysia (JKR Sarawak) v. Lan Thong Ik Construction Sdn Bhd.* (p 387 c-g)

[2] In this case, questions (a) and (c) in Yee Lee's application, namely whether there was a string contract between Mewah, Yee Lee and one KEOR and whether the arbitrators had failed to consider the existence of such a string contract, were questions of fact and not of law. Even if they were relevant points of law, they were merely procedural law pertaining to joinder of parties in arbitration proceedings and not substantial law. The point of law if any, only involved a simple construction of the PORAM rule. Further, it must be noted that the arbitrators had no jurisdiction over third parties, and that being so, questions (b) and (e), which touched on KEOR's liability and failure to nominate the vessel, became irrelevant. (pp 387 h & 388 c-e)

[2a] As for questions (e) and (f), ie. as to proof of loss and causation, they were clearly questions of fact. The court would not interfere with such findings of fact by the arbitrators unless they were totally unsupported by evidence, which they were not. Similarly, the issue of mitigation raised in question (g) was a matter peculiarly for the arbitrators to decide. Yee Lee had thus failed to fulfill the conditions as laid down in *Halfdan's* case. (pp 388 b & g-h)

[3] Leave would normally be given to enforce an award as a judgment unless there was a real ground for doubting its validity or where, as stated in *State Government of Sarawak v. Chin Hwa Engineering Development Co*: (i) the award was defective in form or substance and was hence incapable of enforcement; (ii) the whole or part of the award was ineffective for reason that the arbitrators had no jurisdiction to grant the relief in question. Yee Lee had not demonstrated these grounds and Mewah's application, therefore, had to be allowed. (p 389 e-h)

Case(s) referred to:

Halfdan Grieg & Co v. Sterling Coal & Navigation Corp [1993] 2 All ER 1073 ***(refd)***

Government of Malaysia (JKR Sarawak) v. Lan Thong Ik Construction Sdn. Bhd. [2001] 5 MLJ 629 ***(refd)***

Middlemiss & Gould v. Hartlepool Corp [1972] 1 WLR ***(refd)***

Sheacourt Sdn. Bhd v. Arab Malaysian Toda Construction Sdn Bhd & Anor [1998] 7 MLJ 473 HC ***(refd)***

State Government of Sarawak v. Chin Hwa Engineering Development Co [1995] 4 CLJ 1 SC ***(refd)***

Sundra Rajoo, Function, Power and Duties of Arbitral Tribunal [2001] 2 MLJ xvii ***(refd)***

Yee Hoong Loong Corp Sdn Bhd v. Kwong Fook Seng Co [1993] 1 MLJ 163 ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 22(1)(b), 27

Arbitration Act 1950 [UK], s. 26

For the plaintif - Jeev Anand; M/s How, Zul & Low
For the defendant - P Royan; M/s Shook Lin & Bok

Reported by WA Sharif

JUDGMENT

Raus Sharif J:
These two originating summons arise from similar facts involving the same parties. In originating summons No. R1-24-76-2000, the application is by Mewah Oils & Fats Pte Ltd ("Mewah") for leave to enforce the arbitration award dated 20 December 1999 of the PORAM Arbitration Tribunal ("the award") which had been affirmed on appeal by the PORAM Appeal Board on 29 June 2000 ("the appellate award"). In originating summons No. R2-24-55-2000, the application is by Yee Lee Edible Oils Sdn Bhd ("Yee Lee") to compel the arbitrator to refer the award in the form of special case stated, to the High court pursuant to s. 22(1)(b) of the Arbitration Act 1952.

The agreed facts leading to these two applications are as follows:

> On 7 January, 1999, Mewah entered into three contracts of sale of RBD Palm Olein (each in the month of April 1999, May 1999 and June 1999 with Yee Lee, whereby Mewah agreed to sell to Yee Lee and Yee Lee was under an obligation to nominate and present performing vessel for shipment within the respective contracting months, that is April 1999, May 1999 and June 1999.

Yee Lee failed to nominate a vessel despite repeated reminders from Mewah and consequently, Mewah was forced to sell the said Palm Olein.

Mewah then, on 2 August 1999 initiated claims against Yee Lee by way of an arbitration (as provided for by the contracts) under the auspices of the Palm Oil Refiners Association of Malaysia (PORAM). The main points of Yee Lee's defence in the arbitration on the issue of liabilities are as follows:

(a) there were string contracts between Mewah, Yee Lee and Kulai Edible Oil Refinery ("KEOR") and that KEOR should be made a party to the arbitration; and

(b) KEOR was the last party in the string contracts and it was KEOR that failed to nominate and present performing vessel to shipment within the respective contractual months, namely April 1999 and May 1999.

The arbitrators in their award dated 20 December 1999, had dismissed Yee Lee's defence on the ground that under PORAM Rules of Arbitration and Appeal, string contract disputes could only be proceeded by way of string arbitration provided all parties in the string agree in writing (s. 1(111) cl. 3(i) of PORAM Rules of Arbitration and Appeal). Since Mewah did not agree to do the same, the arbitration should only proceed between Mewah and Yee Lee.

Yee Lee also contended that in the event when it was liable, Mewah failed to mitigate its losses by selling the Palm Olein on 18 May 1999 and 7 June 1999 in respect of the April and May contracts. Yee Lee's contention was that cl. 3(iii)(d) of the contracts provides that "if nomination is received less than fourteen days prior to the last day of the contract, period buyers are deemed to be at fault and the provisions of the default claim shall apply". Therefore, the dates of default were deemed to be on 19 April 1999 and 18 May 1999 as for the April and May contracts respectively for the purpose of calculation of the measure of damages. The reasons of damages were due to the difference in the contract price and the price which had been determined by the price settlement committee on 19 April 1999 and 18 May 1999 for the month of April and May contracts respectively.

The arbitrators found that Mewah indeed had the right to waive the default, when Yee Lee had failed to nominate the vessels in fourteen days prior to the last day of the said contract. The date of default was instead fixed on the first business day after the end of the contract period, namely on 3 May 1999 and 1 June 1999 for the month of April and May contracts respectively. Damages were calculated based on the differences between the contract price and the price determined by the price settlement committee on 3 May 1999 and 1 June 1999 for the April and May contracts respectively. The arbitrators also found that Yee Lee had failed to nominate vessel for shipment within the respective contractual months, that is April 1999 and May 1999 and awarded Mewah the sum damages of USD152,500 together with interest at the rate 10% per annum in respect of the above sum.

Yee Lee appealed to the PORAM Appeal Board but the appeal was dismissed by an award dated 29 June 2000.

On 18 August 2000, Yee Lee commenced an application to compel the arbitrators to state its award in the form of a special case stated regarding certain questions of law to the High Court under s. 22(1)(b) of the Arbitration Act 1952 ("the Act").

On 5 December, 2000 Mewah commenced an application to enforce the award pursuant to s. 27 of the Act.

Yee Lee's Application

Yee Lee's application is made under s. 22(1)(b) of the Act which provides as follows:

(1) An arbitrator or umpire may, and shall if so directed by the High Court state:

(a) (not applicable).

(b) an award or any part of an award, in the form of a special case for the decision of the High Court.

The test in deciding whether a matter should be referred to the High Court was laid down by Lord Denning MR in the English Court of Appeal's decision in *Halfdan Grieg & Co v. Sterling Coal & Navigation Corp* [1993] 2 All ER 1073:

(a) the point of law should be real and substantial and as such open to serious argument and appropriate for decision by a court of law as distinct from a point which is dependent on the special expertise of the arbitrator or umpire;

(b) the point of law should be clear cut and capable of being accurately stated as a point of law as distinct from the dressing up of fact as if it were a point of law;

(c) the point of law should be of such importance that the resolution of it is necessary for the proper determination of the case as distinct from a side issue of little importance.

This principle has been accepted by our courts in *Yee Hoong Loong Corp Sdn Bhd v. Kwong Fook Seng Co* [1993] 1 MLJ 163; *Sheacourt Sdn. Bhd v. Arab Malaysian Toda Construction Sdn Bhd & Anor* [1998] 7 MLJ 473 and the *Government of Malaysia (JKR Sarawak) v. Lan Thong Ik Construction Sdn. Bhd.* [2001] 5 MLJ 629.

I am now considering Yee Lee's application in light of the above stated principle. The questions of law Yee Lee wishes to refer are as follows:

(a) there was a string contract between Mewah, Yee Lee and KEOR and KEOR was the last buyer in the string contract;

(b) under the law KEOR should be liable to nominate the vessel;

(c) the arbitrators failed to take into consideration the existence of a string contract;

(d) KEOR failed to nominate a ship and, therefore, breached the said contract;

(e) Mewah failed to prove its loss was caused by Yee Lee or under the law as the party whose loss was caused by Yee Lee;

(f) Mewah failed to prove that the breach of Yee Lee was the main cause of the loss of Mewah; and

(g) Mewah failed to mitigate its losses.

I am of the view that questions (a) and (c) are not points of law but of fact. As stated earlier, under PORAM Rules and Arbitration and Appeal, string contract disputes could only be proceeded by way of string arbitration, provided all parties in the string mutually agree in writing. However, Mewah did not agree, and for that reason the arbitration was only confined between Mewah and Yee Lee. Even if questions (a) and (c) are relevant to the points of law, they are merely procedural law that is on joinder of parties in arbitration proceedings and not substantial law. To me, the point of law, if any, only involves a simple construction of the PORAM rule. It is not a substantial and complex question of law.

It must be noted that an arbitrator has no jurisdiction over third parties as the powers are created by the agreement of the parties, and thus, cannot be exercised against persons who do not take part in that agreement (see *Sundra Rajoo, Function, Power and Duties of Arbitral Tribunal* [2001] 2 MLJ xvii at xx). By the said reasons, questions (b) and (d) become irrelevant and should be the subject matter of separate proceedings between Yee Lee and KEOR.

With regard to questions (e) and (f), I am of the view that proof of loss and causation are clearly questions of fact. It is elementary that the court should not interfere with findings of fact by the arbitrators, unless such findings are totally unsupported by evidence. Similarly, as to question (g), that is, on the issue of mitigation, I am of the view that the measure of damage is a matter peculiarly for the arbitrator to decide.

Thus, I am of the view that Yee Lee had failed to fulfill the conditions as laid down in *Halfdan*'s case. In any event there was a delay in making the application. It must be noted that Yee Lee's application is made under s. 22(1)(b) of the Act, to compel the arbitrators to state its award in the form of a special case stated regarding certain question of law to the High Court. Application of this nature must be made promptly. In *Shencourt Sdn Bhd,* Steve Shim 'J' (now Chief Judge of Sabah and Sarawak) held that an application made at the submission stage at the end of the hearing was too late and shows

that it is not *bona fide*. In the present case, the application was made after the arbitrator had made his award and Yee Lee's appeal had been dismissed by the Appeal Board. To me if the purported questions of law (a) to (d) regarding string contracts ought to be referred to the High Court under s. 22(1)(b), application should have been made before the making of the award.

For the above reasons, I am constrained to exercise my discretion to compel the arbitrators to refer the award in the form of special case stated on the questions raised for decision of the High Court. Yee Lee's application in originating summons No. R2-24-55-2000 is, therefore, dismissed with costs.

Mewah's Application

Mewah's application is for leave to enforce the arbitration award is provided for under s. 27 of the Act which read as follows:

> An award on an arbitration agreement, may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and, where leave is given, judgment may be entered in term of the award.

In *Middlemiss & Gould v. Hartlepool Corp* [1972] 1 WLR, the English Court of Appeal held that once an arbitral award has been made and the time limit for challenging it has expired, the award become irrevocably final and binding and can therefore, be entered as a judgment and enforced under s. 26 of the English Arbitration Act 1950. The said section is in pari material with our s. 27 of the Act. Leave is normally given to enforce an award as a judgment unless there is a real ground for doubting the validity of the award. In the case of *State Government of Sarawak v. Chin Hwa Engineering Development Co* [1995] 4 CLJ at p. 1 the Supreme Court held that the defence to an application under s. 27 of the Act, may resist the enforcement of an award but showing that:

(1) where the award is defective in form or substance that it is incapable of enforcement;

(2) where the whole or part of the award is ineffective, on the ground that the relief granted lies outside the jurisdiction of the arbitrator.

I am of the view that Yee Lee has not demonstrated the required grounds, that it comes within the test enunciated by our Supreme Court in the above case. Consequently, I allowed Mewah's application in originating summons R1-24-76-2000 with costs.